

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MAGTEN ASSET MANAGEMENT
CORPORATION,

Plaintiff,

v.

MIKE J. HANSON and ERNIE J. KINDT,

Defendants.

Case No. 05-499 (JJF)

**MOTION OF DEFENDANTS MICHAEL J. HANSON AND ERNIE J. KINDT
FOR LEAVE TO FILE
A DISPOSITIVE MOTION AND BRIEF IN SUPPORT**

Defendants Michael J. Hanson (“Hanson”) and Ernie J. Kindt (“Kindt”), by and through their counsel of record, hereby respectfully requests this Court grant them leave to file a dispositive motion and brief in support thereof.

Pursuant to this Court’s Rule 16 Scheduling Order issued on or about November 3, 2006, this Court requires that any case dispositive motions be served and filed with an opening brief on or before September 17, 2007. The Rule 16 Scheduling Order further states that if a party desires to file a case dispositive motion more than ten (10) days from the September 17 date, that party may do so only with leave of the Court.

Defendants Hanson and Kindt believe they have a meritorious case dispositive motion based in large part on this Court’s recent decision in the related matter, *Magten Asset Management Corp., et al v. Paul Hastings Janofsky & Walker, LLP*, (“PHJW”) Cause No. 04-1256-JJF (the “PHJW Opinion”). *See* the PHJW Opinion dated January 12, 2007, attached hereto as Exhibit A. In this Court’s Order Granting Judgment on the Pleadings in favor of PHJW, this Court found in part that (1) a party who is not the transferee of the assets in question will not be liable for any alleged fraudulent transfer [*see* PHJW Opinion, at p. 6]; (2) Magten

lacks standing to pursue its claims because its claims are derivative claims [see PHJW Opinion at p. 8]; (3) that Magten lacks standing to bring a derivative claims against Clark Fork as a creditor because Magten was not a creditor of Clark Fork at the time of the Transfer and therefore cannot satisfy the “contemporaneous ownership” requirement under Montana’s Limited Liability Company Act [see PHJW Opinion, at p. 9]. As will be described in greater detail in their dispositive motion and opening brief, Defendants Hanson and Kindt believe the same rationale applies to the case against them that applied in the case against PHJW, and therefore, Magten cannot establish its claims against them in light of this Court’s decision in *Magten v. PHJW*.

As this Court is aware, discovery is ongoing and depositions will soon be scheduled as fact discovery is scheduled to close on May 2. Following the closure of fact discovery, the parties will commence expert witness discovery. Following the close of expert witness discovery, this Court permits the parties to file case dispositive motions without leave of Court. The discovery process is expensive and time consuming. It is not in the interests of justice or a wise use of the parties and this Court’s limited resources to require litigants to complete the discovery process when a meritorious case dispositive motion can be made without the need for discovery. While Defendants Hanson and Kindt will continue to comply with the discovery obligations placed upon them, and are not here seeking a stay of discovery as to them, they believe they can minimize the cost and expense to them of this litigation process if they are permitted to file their case dispositive motion at this time.

Prior to filing this Motion for Leave to File Dispositive Motion, and as contemplated by District Court Rule 7.1.1, Defendants contacted Magten’s counsel and requested Magten voluntarily agree to dismiss this case with prejudice in light of this Court’s decision in *Magten v.*

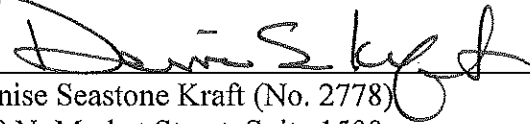
PHJW. *See* letter to Bonnie Steingart from Stanley T. Kaleczyc and Kimberly A. Beatty dated January 29, 2007, attached hereto as Exhibit B. Magten's counsel requested, and was initially granted, additional time within which to consider the dismissal request. *See* letter to Stanley T. Kaleczyc and Kimberly A. Beatty from Dale R. Dubé and Bonnie Steingart dated January 30, 2007, attached hereto as Exhibit C. *See* also letter to Dale R. Dubé from Stanley T. Kaleczyc and Kimberly A. Beatty dated January 30, 2007, attached hereto as Exhibit D. However, shortly after the additional time was granted, Magten's counsel requested an extension of time within which to amend their Complaint or add an additional Plaintiff, based in part on their review of our request for a dismissal. *See* letter to Stanley T. Kaleczyc and Kimberly A. Beatty from John W. Brewer dated January 31, 2007, attached hereto as Exhibit E. Defendants Hanson and Kindt believe that Magten's letter contains the implicit suggestion that the request to dismiss this matter has merit, and that Magten's tactics are a transparent attempt to use a procedural device to obtain more time within which to try to correct a fatally defective pleading. As a result, Defendants Hanson and Kindt have rescinded the extension of time granted to Magten to consider a voluntary dismissal and have agreed to represent to this Court that Magten opposes this Motion for Leave to File Dispositive Motion, and any underlying dispositive motion, at this time. *See* letter to John W. Brewer from Stanley T. Kaleczyc and Kimberly A. Beatty dated February 1, 2007, attached hereto as Exhibit F.

Nonetheless, Defendants Hanson and Kindt believe their dispositive motion has merit in light of this Court's other recent decisions and that they should be granted leave to file such dispositive motion now in an effort to minimize the burden and expense of litigation on them. For these reasons, Defendants Hanson and Kindt request this Court grant them leave to file a case dispositive motion.

Pursuant to District Court Rule 7.1.2(a), Defendants Michael J. Hanson and Ernie J. Kindt waive their right to file an opening brief on the motion but reserve the right to file a reply in the event that Plaintiff opposes this motion.

Dated: February 1, 2007

EDWARDS ANGELL PALMER & DODGE LLP



Denise Seastone Kraft (No. 2778)

919 N. Market Street, Suite 1500

Wilmington, DE 19801

Phone: (302) 425-7106

Fax: (888) 325-9741

- and -

Stanley T. Kaleczyc, Esquire

Kimberly A. Beatty, Esquire

BROWNING KALECZYC BERRY & HOVEN P.C.

139 North Last Chance Gulch

P.O. Box 1697

Helena, Montana 59624

Phone: (406) 443-6820

Fax: (406) 443-6883

Counsel for Mike J. Hanson & Ernie J. Kindt